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No. 778

In the Supreme Court of the United States

OCTOBER TERM, 1968

FRANK KENT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court:

Petitioner, Frank Kent, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered on June 18, 1968 (App. 11, rehearing denied, August 26, 1968 App. 12).

(a) OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, is reported in 397 F.2d 446. A copy of the official Opinion of this case is appended hereto (Appendix 1-10).

(b) JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Seventh Circuit, affirming the Judgment of the United States District Court for the Northern District of Illinois, was entered on June 18, 1968 (R. 4). Petition for Rehearing was denied on August 26, 1968. The Court allowed Petitioner's motion for a stay of mandate pending filing of a Petition for Writ of Certiorari to this Honorable Court.

The jurisdiction of this Court is invoked under Title 28 United States Code, Par. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Where a plea of guilty is coerced by the District Court and induced by the fraudulent promises of the Court's Deputy United States Marshal, whether the Court erred in denying the Defendant's Motion to Vacate the sentence pursuant to Title 28, Section 2255, United States Code.

II. Where upon a Hearing, the sworn testimony of the Defendant and his trial attorney, support the Defendant's verified Petition and the Affidavit of his trial attorney and no evidence, whatsoever, is offered by the Government, whether the District Court erred in refusing to grant a new trial, in reliance solely upon the Affidavit of the Court's Deputy United States Marshal, which, in part, corroborates the Defendant's allegations.

III. Whether the District Court adequately complied with Rule 11, Federal Rules of Criminal Procedure or deliberately misled the Defendant by advising him that "—the maximum means the most that I could do—", referring to imprisonment of one year and a fine of $1,000, and then imposing five consecutive sentences and five cumulative fines.

IV. Whether there was a complete failure to afford the Defendant his right of allocution in clear violation of Rule 32(a)(1), Federal Rules of Criminal Procedure, where the Defendant sought to protest his innocence and the Court cut him off and promptly imposed sentence.

STATUTES INVOLVED

The pertinent portions of Title 28, § 2255, U.S.C.A. are set forth in the Appendix, at p. App. 13.

RULES INVOLVED

The pertinent parts of Title 18, Rule 11, U.S.C.A. and of Title 18, Rule 32, U.S.C.A. Federal Rules of Criminal Procedure are set forth in the Appendix, at p. App. 14.

STATEMENT OF THE CASE

Petitioner was charged in an eight count information with the unlawful sale and delivery of depressant and stimulant drugs in violation of Title 21, §331(q)(2), United States Code (A. 4-7). The day following the commencement of a jury trial, the defendant entered a plea of guilty to counts one to five of the information. His motion for pre-sentence investigation and application for probation were both denied. He was sentenced to nine months imprisonment and fined $500.00 on each count, said sentences to be consecutive for a total of forty-five months and the fines to be cumulative totalling $2500.00. He was forthwith remanded to the custody of the United States Marshal. (A. 8-10)

Thirteen days after sentence the defendant filed his verified petition to vacate the conviction and sentence supported by the affidavit of his trial counsel, pursuant to Title 28, §2255 United States Code. (A. 10-27). Petitioner set forth that he was coerced and intimidated by the comments of the Court to his counsel to the effect that he was non-plused by counsel's opening statement; that the defendant was confronted with a very serious problem; that the Court was not telling counsel how to try his law suit, but that counsel had a great responsibility here; that criminal lawyers had the impression that merely because the agent turns out to be the buyer, it doesn't mean that there is entrapment; that it isn't easy to persuade a jury of the defense of entrapment; that it isn't easy to persuade the Court to give an entrapment instruction; that the Court felt he owed it to counsel to say these things in the defendant's presence. The Court further said that the case could be disposed of very quickly without a jury; that there was an erroneous notion that transactions with an agent are per se entrapment; that in the Court's opinion it was good police work; that in all his years in the District Court whenever he had given an entrapment instruction at the defendant's request the verdict was always guilty. The Court further said, he was talking for the defendant's benefit. He then suggested a conference between counsel and the United States Attorney.

While the defendant and his counsel were conferring in a room opposite the courtroom, the Court's deputy United States Marshal entered and whispered into the defendant's ear that he and the Judge had discussed the defendant's case and that the judge wanted to give the defendant a break if he pleaded guilty. He admonished the defendant to answer in the negative if he was ever asked if he was promised anything. The Marshal then displayed his membership card in the Shriner's, to corroborate his statement

that he, the Court and the defendant were all members of the same fraternity. (A. 10-15) Defendant's petition further alleged that he was intimidated and coerced by the lengthy comments of the Court, including the comment to his counsel: "You want your client to continue breathing fresh air, is that it?" (A. 13) In addition he placed full reliance upon the representations of the Court's Marshal and thus decided to enter his plea of guilty.

Defendant's petition was verified in part by the affidavit of the deputy United States Marshal as well as by the affidavit of his trial counsel who was appearing for his first time in the defense of a Federal criminal case.

Upon entering his plea of guilty, the defendant was informed in part by the Court that he could impose a maximum penalty one year on each of the counts, adding: " — maximum means the most I could do — and a fine of $1000.00 maximum on each of said counts." Defendant understood this to mean that the total maximum punishment could not exceed one year and the total maximum fine could not exceed $1000.00. The terms consecutive, cumulative nor concurrent were not defined to him by the Court. He had never before been in a courtroom nor was he ever previously involved in any criminal charge. When asked by the Court whether anyone had represented to him what the Court might do on his plea of guilty, he answered in the negative as advised so to do by the Court's Marshal.

When the Court advised the defendant that he might speak in his own behalf, the defendant said, in part: " * * * the whole thing that was presented here was completely twisted * * * ." The Court promptly cut off the defendant and denied him the opportunity to inform the Court that he had been entrapped by the agent after

thirteen months of persistent and fraudulent inducement, though defendant had never before been involved in any similar transactions nor in any criminal violations whatsoever.

The Court peremptorily imposed sentences of nine months on each of the five counts of the information, to run consecutively, for a total of forty-five months and fines of $500.00 on each of the counts, cumulative, totalling $2500.00. Motions for pre-sentence investigation and for probation were denied, his bail was terminated and the defendant remanded to the custody of the United State's Marshal.

All that the Government filed in opposition to the defendant's petition to vacate the sentence and his counsel's supporting affidavit, was the affidavit of the Court's Marshal, which though denying defendant's allegations as to promises of the Court, admitted that he had displayed his membership card in the Shriner's in the course of the alleged conversation.

On July 6, 1967, the Court conducted a hearing. Defendant and his counsel testified under oath in support of his motion to vacate the sentence. Their testimony was not denied by any witness, nor was the Court's Marshal called by the Government, though he was immediately outside of the Courtroom pursuant to an order of exclusion of witnesses. No evidence whatsoever, was offered by the Government, in opposition to or contradiction of that offered on behalf of the defendant.

After hearing arguments of counsel the Court denied defendant's motion to vacate the sentence and remanded the defendant to the custody of the Attorney General (A. 77-88).

REASONS FOR GRANTING THE WRIT

I.

THE DEFENDANT'S PLEA OF GUILTY WAS NOT VOLUNTARILY AND UNDERSTANDINGLY GIVEN BUT WAS COERCED BY THE DISTRICT COURT AND INDUCED BY THE FRAUDULENT PROMISES OF THE COURT'S MARSHAL. THE COURT THEREFORE ERRED IN DENYING THE DEFENDANT'S MOTION TO VACATE THE SENTENCE PURSUANT TO TITLE 28, SECTION 2255, UNITED STATES CODE.

On June 13, 1967 a jury was selected, opening statements were made and evidence of an agent for the Food and Drug Administration was heard. Prior to the resumption of the trial the following day, the Court embarked upon a lengthy colloquy with defendant's counsel concerning the Court's unfavorable reaction to his opening statement; that the defendant had a very serious problem; that while the Court was not telling him how to try his lawsuit, he (defense counsel) had a great responsibility; that criminal lawyers had an erroneous impression about the law of entrapment; that it isn't easy to convince the jury as to proof of entrapment; that it isn't easy to convince the Court that he is required to give an entrapment instruction; that the case could be quickly disposed of if it were tried without a jury; that there was an erroneous impression that transactions with an agent are per se entrapment; that on the contrary it is more often good police work; and that in all his years on the Federal bench, that on every occasion he had given an entrapment instruction at the request of the defendant the verdict has always been guilty. The Court further said that he was talking

for the benefit of the defendant, the man who was most vitally interested, as well as for the benefit of his counsel. The foregoing was said in the presence and hearing of the defendant and more fully appears in pages 11 to 14 of the Appendix, and in pages 14 to 27 of Petitioner's [defendant's] Exhibit 1, for identification, which was denied admission into evidence as part of the defendant's proof in support of his motion to vacate the sentence pursuant to the provisions of Title 28, §2255. (A. 77). The Court suggested a conference with the government's attorney and a recess was called for that purpose.

While in the attorney's room with his counsel, the Court's deputy entered and in a whispered conversation with the defendant told him that he and the Judge had talked about the defendant's case and that the Judge wanted to give the defendant a break if he pleaded guilty. He admonished him to say "no" if he was asked if anyone promised him anything; that everything would be okay; that the defendant, himself and the Judge were all members of Medinah Temple. To prove it the marshal displayed his membership card. (A. 14-15, 24, 46, 59-60, 69-70).

Then, after a conference between his counsel and the government's attorney, the defendant returned to the courtroom and his counsel asked leave to change his plea to guilty to the first five counts of the eight count information. (A. 16). The effect of the aforesaid colloquy by the Court, created in the defendant's mind that his cause was hopeless, that his defense of entrapment would not prevail and that dire consequences would flow therefrom. (A. 14, 55-58); that he relied upon the assurances of the deputy marshal and that he said "no" when the Court asked if anyone had given him any assurances, because the Court's marshal told him to. (A. 19-21, 60, 62).

When the Court advised the defendant of the punishment he could impose, he defined it in part by saying "—the maximum means the most that I could do—". The defendant understood the Court to mean that maximum punishment could be one year and a $1,000 fine. (A. 16, 71). After the imposition of a consecutive sentence of nine months and cumulative fines of $500.00 on each of five counts of the information, neither the defendant nor his attorney understood the sentence. (A. 49, 71-72).

In *Machibroda* v. *United States,* 368 U.S. 487 (1962), the Court in an analogous situation said:

> "There can be no doubt that, if the allegations contained in the petitioner's motion and affidavit are true, he is entitled to have his sentence vacated. A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void. A conviction based upon such a plea is open to collateral attack. [citing cases]
>
> * * *
>
> Out of consideration of person accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Kercheval* v. *United States,* 274 U. S. 220, 223.

In *Euziere* v. *United States,* 249 F.2d 293, 294-295, C.A. 10 (1957), the Court said:

> "Fundamental standards of procedure in criminal cases require that a plea of guilty to the charge or charges contained in an indictment or information *be entered freely, voluntarily, and without any semblance of coercion. A plea of guilty interposed as the result of coercion is not consistent with due process and therefore a judgment and sentence imposed pursuant to such a plea cannot stand.* [citing cases]. *We*

think it clear that the statements made by the trial court were reasonably calculated to influence the defendants to the point of coercion into entering their pleas of guilty." [Emphasis supplied]

To the same effect is the decision in *Zaffrano* v. *United States,* 306 F.2d 707, 710, C.A. 9 (1962).

The allegations of defendant's petition in support of his motion to vacate the sentence were not denied by the Government, except for the affidavit of the Court's Marshal. Upon the hearing on the motion to vacate, the defendant (A. 51-77) and his trial counsel (A. 41-50) testified. No contrary evidence was offered by the government to meet or overcome defendant's proof. Instead, the court denied the defendant's motion to vacate.

Under the foregoing circumstances, in the light of the applicable authorities, the court should have allowed the defendant's motion to vacate and grant a new trial.

II.

WHERE UPON A HEARING, THE SWORN TESTIMONY OF THE DEFENDANT AND HIS TRIAL ATTORNEY, SUPPORT THE DEFENDANT'S VERIFIED PETITION AND THE AFFIDAVIT OF HIS TRIAL ATTORNEY AND NO EVIDENCE, WHATSOEVER, IS OFFERED BY THE GOVERNMENT, THE DISTRICT COURT ERRED IN REFUSING TO GRANT A NEW TRIAL. THE COURT ERRED IN RELYING SOLELY UPON THE AFFIDAVIT OF THE COURT'S MARSHAL, WHICH, IN PART, CORROBORATED THE DEFENDANT'S ALLEGATIONS.

The defendant filed his petition in support of his motion to vacate the judgment and sentence (A. 10-22) supported by the affidavit of his trial counsel. (A. 22-27). The government filed only an opposing affidavit of the Court's

Marshal. (A. 31-37). Upon the hearing of defendant's motion to vacate the only evidence heard by the Court was the testimony of the defendant (A. 51-77) and his trial attorney (A. 41-50), as well as defendant's offer into evidence of a transcript of the proceedings of June 14, 1967, the day the defendant was sentenced. Said transcript of proceedings, Petitioner's [defendant's] Exhibit 1, for Identification was offered into evidence, but the Court denied its admission. (A. 77). The defendant then rested his proof. The Court inquired whether the government had a motion. A short recess was called and after the hearing resumed the government moved to deny the prayer of defendant's petition which motion the Court allowed and remanded the defendant to the custody of the Attorney General of the United States. (A. 77-78).

No evidence was offered by the government in opposition to or in contradiction of the testimony of the defendant and his trial attorney.

In *United States* v. *Salerno,* 299 F. 2d 105, 106, C. A. 2 (1961) the Court said:

> "Section 2255 requires a hearing 'Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.' *Applying this language, the Supreme Court has frowned upon reliance on factual statements in opposing affidavits, since they are not 'files and records of the case.'* [citing cases]" [Emphasis supplied].

In *Scott* v. *United States,* 349 F. 2d 641, 643, C.A. 6 (1965) the Court said:

> "Under the holding of the United States Supreme Court in *Machibroda* v. *United States,* 368 U.S. 487, 82 S.Ct. 510, 7 L.Ed. 2d 473 (1962), the affidavits filed by the United States cannot be regarded as conclusive.

> 'This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the 'files and records' in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the Distict Judge could completely resolve by drawing upon his own personal knowledge or recollection. * * *' *Machibroda* v. *United States, supra* at 494-495, 82 S.Ct. at 514."

In *Romero* v. *United States,* 327 F. 2d 711, 712, C.A. 10 (1964) the Court said:

> "The district judge, in denying the motion without a hearing, *fell into his error by undertaking to rely upon an affidavit of the district attorney, that no statements of the kind charged were made, and upon his own finding and conclusion, that the claim of the applicants, that such promises were made, was ridiculous and preposterous upon its face. This he could not do. Cf. United States* v. *Hayman, supra,* and *Machibroda* v. *United States, supra,* 368 U.S. at p. 494, 82 S.Ct. at pp. 513-514, 7 L.Ed. 2d 473." [Emphasis supplied].

As a matter of fact the opposing affidavit of the court's marshal contained, in part, corroboration of the allegations of the defendant's petition and the supporting affidavit of his trial counsel. In said affidavit the marshal said:

> "7. That at this time your affiant went to the room, knocked on the door and entered. At this time your affiant advised the defense lawyer and his client that when they completed their conference to notify him so that he could notify the court.

> Your affiant commented on the defendant's emblem, stating 'I notice you are wearing a Shriner's emblem. I am a Shriner out of Medinah'. The defendant looked at me. At this time your affiant took his card case from his pocket and showed Frank Kent his Shriner's card. Your affiant then put his card case back into his pocket. He then said to the defense counsel and the defendant, 'Let me know when you're ready so I may notify the court.' Your affiant then left the room."

The foregoing admission by the marshal assumes great importance when examined in the light of the uncontradicted testimony of the defendant that he first met said deputy marshal on February 8, 1967 who greeted him with, "Hello Noble", a greeting between members of the Shrine. The defendant was wearing his Shriner's emblem, a half moon with a sword through it; a pin of gold and pearl substance, printed across it is "Medinah Temple". (A. 52) The defendant had occasion to see said deputy marshal during the ten times he came to court and who always spoke to him on these occasions and usually, similarly greeted him, "Hello, Noble."

The veracity of the marshal's affidavit is extremely questionable, particularly in the light of the failure of the government to call him as a witness, at the hearing, to rebut, if he could, the defendant's testimony. In addition the government failed to rebut the testimony of the defendant concerning the rejection of a certain juror (A. 53), and of the further statement to the defendant by the marshal to the effect that: "No one is your friend who frames you. You would be much better off if you pleaded guilty." (A. 65).

Said marshal's affidavit should further be examined in the light of his furtive conduct concerning the display of

the Medinah Temple membership card and his concealment of it when Mr. Riley sought to determine what it was. Furth r uncontradicted at the hearing was the testimony of Mr. Riley, that: "I saw some kind of card in his hand. I didn't k ow what it was so I went over to see and I did see. I just saw 'Medinah' on it and then he put it away. Then he left the room. (A. 42). The very conduct admitted by the deputy marshal in his affidavit is grossly out of keeping with a court official whose duty requires that he conduct himself impartially and in a manner above reproach.

Upon the basis of the record, in the light of the uncontradicted evidence adduced by the defendant upon the hearing and in the light of the applicable authorities hereinbefore cited, the defendant should have been granted a new trial.

III.

THE DISTRICT COURT FAILED TO ADEQUATELY COMPLY WITH RULE 11, FEDERAL RULES OF CRIMINAL PROCEDURE AND DELIBERATELY MISLED THE DEFENDANT BY ADVISING HIM THAT "—THE MAXIMUM MEANS THE MOST THAT I COULD DO—", REFERRING TO IMPRISONMENT OF ONE YEAR AND A FINE OF $1,000, AND THEN IMPOSING FIVE CONSECUTIVE SENTENCES AND FIVE CUMULATIVE FINES.

Rule 11 of the Federal Rules of Criminal Procedure provides in pertinent part:

> "* * The Court * * shall not accept the plea without first determining that the plea is made voluntarily with the understanding of the nature of the charge."

In *United States* v. *Lester*, 247 F. 2d 496, 500 C.A.2 (1957) the Court said:

> "It is the duty of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made. United States v. Davis, supra [7 Cir., 1954, 212 F.2d 264] (citing cases). Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry. United States v. Davis, supra. * * Comprehension of the charge demands more than familiarity with the crime alleged. *The court must determine whether the plea has been improperly induced by the prosecutor and whether the defendant is aware of 'the nature of the charges, the statutory offenses included within them, and the range of allowable punishment thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.'* (citing cases). *Such a determination may be made only by a penetrating and comprehensive examination of all the circumstances under which the plea is made.*" (Emphasis supplied).

Upon the hearing of the defendant's motion to vacate when it was sought to be shown that he did not in fact understand the nature of the charges, the Court sustained an objection to the question. The transcript of the proceedings reflects the following:

> "Q. [by Mr. Sherwin of defendant Kent] Did you then understand what was meant by Title 21, United States Code, Section 321 (v) in parenthesis? * * * in violation of Title 21, United States Code, 331 (f)(2)? Did you know what that was?"
>
> "Mr. Connelly: I object, if the Court please. It is taking it out of context.

"The Court: I sustain the objection. I read every single word of the five counts."

"The Court: When the time comes when some competent court, qualified court, says that we must define every word in an indictment or information to a defendant—"

"Mr. Sherwin: That is how it is done Judge."

"The Court: *There may be something to it.*" [Emphasis ours].

"Mr. Sherwin: This is how it is done when somebody asserts the right—"

"The Court: Oh, I know how to do it, Mr. Sherwin. I know how to get a man to say whether he understands or he doesn't understand it. *He told me he did, and if he said he didn't, I would not have accepted his plea.* Let's not argue." [Emphasis ours.] (A. 60-61).

When it was sought to be shown that the defendant did not understand the range of allowable punishments under the charges to which the defendant had entered his guilty plea, the Court again sustained an objection thereto. The transcript of proceedings discloses the following:

"The Court advised me in the following language preceding his acceptance of my plea of guilty: 'I must tell you, Mr. Kent, that the Court could impose a maximum penalty of one year imprisonment on each of these counts—*maximum means the most that I could do*—and a fine of $1,000 maximum on each of these counts, or both.'" (Emphasis ours.)

"Q. [by Mr. Sherwin]: From the language just read to you, as the Court told it to you, what did you understand him to mean?"

"Mr. Connelly: I object to that, if the Court please."

"The Court: I sustain the objection." (A. 61).

When, in response to being told by the Court: "Mr. Kent, the law gives you the right to speak in your own behalf.",

the defendant sought to respond fully, the record reflects that in the midst of his reply, and after two sentences the Court cut him off and said:

> "I didn't rely on your lawyer's statement; I am relying on your plea of guilty to the five counts after I reviewed with you what you were charged with and you said you understood what you were charged with." (A. 62-63)

When on the hearing on the motion to vacate the defendant sought to show what the Court said, in his comments to defendant's trial counsel, that induced or persuaded the defendant to enter a guilty plea the Court again sustained an objection.

The record further reflects the following:

> "Q. [by Mr. Sherwin]: Prior to the language in connection with your plea of guilty, was there anything that the Court said in his comments to your lawyer that induced or persuaded you to plead guilty?"
> "Mr. Connelly: I object to that, if the Court please."
> "The Court: I sustain the objection." (A. 63).

It is readily apparent, that upon the hearing on defendant's motion to vacate, as upon the date sentence was imposed, the trial Court was not interested in permitting the full determination required by Rule 11. Cold print does not afford the means of disclosing to this Court the intonations, inflections, demeanor and conduct of the trial Court to the defendant and his counsel at the time of sentencing, not at the time of the Court's lengthy colloquy and calculated "hard sell" preceding defendant's plea, that coerced and precipitated the defendant's plea of guilty.

In accord with the above-cited authority are the decisions in *Rowe* v. *United States,* 227 F. Supp. 666, 672 D.C.W.D. Wis. (1964); *United States* v. *Davis,* 212 F. 2d 264, 267 C.A.7 (1954); *Munich* v. *United States,* 337 F.2d 356, 360-361 C.A.9 (1964); and *Domenica* v. *United States,* 292 F.2d 483, 485-486 C.A.1 (1961).

In view of the facts hereinbefore set forth and discussed and in the light of the applicable authorities, the trial Court did not adequately comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure at the time of the sentencing. Nor did the Court, upon the hearing of the defendant's motion to vacate afford his present counsel an adequate and proper opportunity to present his proof in support of his motion to vacate.

IV.

THERE WAS A COMPLETE FAILURE TO AFFORD THE DEFENDANT HIS RIGHT OF ALLOCUTION IN CLEAR VIOLATION OF RULE 32(a)(1), FEDERAL RULES OF CRIMINAL PROCEDURE, WHERE THE DEFENDANT SOUGHT TO PROTEST HIS INNOCENCE AND THE COURT CUT HIM OFF AND PROMPTLY IMPOSED SENTENCE.

Immediately before imposing sentence upon the defendant the Court informed the defendant:

> "Mr. Kent, the law gives you the right to speak in your own behalf. You may say anything you like to me as long as you are respectful."

In reply Kent stated to the Court:

> "Well, your Honor, the only thing as far as I am concerned *is that the whole thing that was presented here was completely twisted, as far as I was concerned.* Basically, the facts are right that my lawyer presented such as that I did sell, *but the circumstances were not the way that—*" [Emphasis supplied.]

At that point the Court interrupted Kent and did not afford him the opportunity to complete his statement. Kent (as set forth in his petition to vacate) intended to advise the Court that he was ensnared by the Food and Drug Administration agent; that said agent's evidence was not entirely truthful.

The record discloses the following:

> "The Court: I didn't rely on your lawyer's statement. I am relying here on your plea of guilty to the five counts after I reviewed with you just what you were charged with and you said you understood what you were charged with.
>
> The Defendant: It still stands.
>
> The Court: And you even put the government to the trouble and time of starting this trial, the Court to the trouble of selecting a jury, of examining prospective jurors. Now you have pleaded guilty to these five counts.
>
> The Defendant: Yes, and I still stand on that, Your Honor.
>
> The Court: I don't think there are two interpretations that can be placed on your conduct. If you did the things that you are charged with, that is what you did.
>
> Now you tell me what you think entitles you to any special consideration here.
>
> The Defendant: Special consideration?
>
> The Court: Yes, or consideration of any kind that you are entitled to in respect to these five counts. Maybe you can do better than your lawyer. He did all right for you, he has been very gentlemanly and respectful.
>
> The Defendant: Yes, sir.
>
> Well, your Honor, I do not have a history of selling drug abuse items throughout the industry."

After an exchange of conversation between the Court and defendant's attorney, the Court then announced his sentence.

From the foregoing it is apparent that there was a complete failure to afford the defendant his right of allocution, which is spelled out clearly in Rule 32(a) (1), Federal Rules of Criminal Procedure, in this language:

> "Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and *shall address the defendant personally* and ask him if he wishes to make a statement in his own behalf, and to present any information in mitigation of punishment." [Emphasis added].

Such a failure is error. *Haywood* v. *United States,* 393 F.2d 780 (5 Cir. 1968); *Cuozzo* v. *United States,* 325 F.2d 274 (5 Cir. 1963); *Hill* v. *United States,* 368 U.S. 424, 82 S. Ct. 468, 7 L.Ed. 2d 417 (1962), and *Green* v. *United States,* 365 U.S. 301, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961).

CONCLUSION

For the reasons above set forth, in the light of the uncontradicted state of the record, and of the applicable authorities herein cited and discussed that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JULIUS L. SHERWIN,
THEODORE R. SHERWIN,
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 16356 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
FRANK P. KENT,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 18, 1968

Before CASTLE, *Chief Judge,* HASTINGS and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge*: Frank P. Kent appeals from an order of the district court denying his motion made pursuant to 28 U.S.C. § 2255. The motion was filed thirteen days after Kent entered a plea of guilty and was sentenced on five counts of an eight-count information charging him with unlawfully selling and delivering a variety of "depressent or stimulant" drugs in violation of 21 U.S.C. § 331 (q)(2). In his motion, Kent sought to have the judgment of conviction and sentence set aside, to have his plea of guilty withdrawn, and to have a new trial.

After a lengthy hearing in which both Kent and his trial counsel testified, the district judge denied the motion, reciting in detail the reasons for his action. In the course

of his oral remarks, the district judge viewed Kent's motion as essentially one seeking leave to withdraw his plea of guilty pursuant to FED. R. CRIM. P. 32(d). Since the other relief Kent requested in his motion would necessarily have been granted if he were allowed to withdraw his plea of guilty, we believe that the district judge properly considered the motion pursuant to Rule 32(d). *Kienlen* v. *United States,* 379 F.2d 20, 23 (10th Cir. 1967); *Kadwell* v. *United States,* 315 F.2d 667 (9th Cir. 1963); *Pilkington* v. *United States,* 315 F.2d 204, 209 (4th Cir. 1963).[1]

Before this court, Kent advances two major contentions. First, he says that he was induced to plead guilty by the conduct of both a deputy United States Marshal and the district judge before whom the case was tried, thereby rendering his plea involuntary.[2] Second, he says that his plea of guilty was accepted by the district judge in violation of FED. R. CRIM. P. 11 in that Kent did not understand either the nature of the charge against him or the range of allowable punishment.

Some background is necessary in order to evaluate Kent's first contention. After an eight-count criminal information was filed against him on January 24, 1967, Kent entered a plea of not guilty to all counts. On June 13,

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[1] The "manifest injustice" standard for granting relief under Rule 32(d) provides the district court with greater leeway than the standard under 28 U.S.C. § 2255. Hence Kent is not in any way prejudiced by consideration of his post-trial petition under Rule 32(d). If Kent was entitled to the relief he prayed for in his petition, that relief would be granted irrespective of the designation he gave his petition.

[2] The same judge passed upon Kent's post-trial petition.

1967, the trial of the case commenced. A jury was empaneled, and opening statements were made by both the prosecution and the defense. The Government's first witness was James P. Braseth, an agent for the Bureau of Drug Abuse Control, United States Food and Drug Administration. He testified in detail concerning the sale and delivery by Kent to him of a variety of depressant or stimulant drugs, 21 U.S.C. § 321(v)(1). Before Agent Braseth had completed his direct testimony, the court adjourned the trial until the following morning.

Upon the presumption of the trial, a lengthy colloquy ensued, out of the presence of the jury, between the district judge, Kent's counsel, and the assistant United State's Attorney.[3] It is on the basis of this colloquy that Kent contends that he was intimidated and coerced by the district judge into pleading guilty, thereby rendering his plea involuntary.

In urging the coercive effect of the district judge's comments during the colloquy, Kent points in his brief to:

> [T]he Court's unfavorable reaction to the opening statement for the defendant; that the defendant was confronted with a very serious problem; that while the Court was not telling him how to try his lawsuit, he (defense counsel) had a great responsibility; that criminal lawyers had an erroneous impression about the law of entrapment; that it isn't easy to persuade a jury as to proof of entrapment; that it isn't easy to convince the Court that he is required to give an entrapment instruction; that the case could be quickly disposed of if it were tried without a jury; that there was an erroneous impression around that transactions with an agent are per se entrapment; that on the contrary it is more often good police work, good en-

[3] Kent was present throughout the colloquy.

> forcement work; and that in all his years on the Federal bench, that on every occasion he had given an entrapment instruction at the request of the defendant the verdict has always been guilty.

Although it is true that the district judge did make some of the comments attributed to him by Kent, these comments cannot be viewed outside the context of the lengthy colloquy in which they were made.

During the colloquy, Kent's attorney indicated a willingness to stipulate concerning certain of the physical exhibits offered into evidence by the Government. The district judge remarked that any stipulations were dangerous and misleading when a case was being tried before a jury. Immediately after this comment, the district judge said, "If this were a case tried without a jury, I think it could be disposed of very quickly." Kent focuses on this statement as conveying the impression that his cause was hopeless. When viewed in context, however, the statement was innocuous. The obvious purport of the district judge's comment was that the case could be tried more expeditiously by the use of stipulations if there were no jury.

With respect to the judge's comments concerning defense counsel's opening statement, as the judge himself said, "I didn't quite understand the position of the defendant as you [defense counsel] stated it to the jury. . . . I like to understand clearly the position taken by a lawyer in the trial of the case." Likewise, the judge's comments concerning Kent's entrapment defense and his proposed instruction on that defense came after Kent's counsel stated, "[W]e are going to confess these facts for the most part." In view of counsel's willingness to admit most of the facts, the judge was merely trying to point out the serious problem facing Kent in claiming entrapment.

Instead of attempting to coerce or intimidate Kent or his counsel, the judge sought to offer assistance. That Kent's counsel so viewed the judge's comments appears from his statement that, "I appreciate your talking to us like this. . . . I do believe he [Kent] has gotten a great benefit from hearing you."

Further indications that the district judge's comments, when viewed in their totality, could not reasonably be construed to be intimidating or coercive appear in the record. During the colloquy, the judge on several occasions emphasized that he could reach no conclusion on the entrapment instruction until he heard all the evidence. In addition, he indicated that, "Mr. Kent . . . is as innocent as anyone in the courtroom until he is proven guilty as required by law." Likewise, the judge reiterated his willingness to call back the jury and to continue the trial, emphasizing on one occasion, "You [Kent] are putting the [G]overnment here, as you have a right to do, . . . to the necessity of proving its case, if it can prove its case, as required by law. But if that is what you want, we will try it straight through." Finally, in response to a suggestion by Kent's counsel that the judge "bridge any gap" between opposing counsel, the judge engaged in a lengthy statement in which he unequivocally indicated his view "that it is improper for the Court to negotiate with a defendant accused of a crime."

When viewed in their entirety, we can discover nothing of a coercive or intimidating nature in the district judge's comments. Nor do we believe that a reasonable person in Kent's position would find anything intimidating or coercive in the remarks. The district judge's comments in the instant case, even when viewed in isolation, cannot be compared with those made by the judge in *United States* v. *Tateo*, 214 F. Supp. 560 (S.D. N.Y. 1963). In *Tateo*, the

trial judge had stated in the middle of the trial that he would sentence the defendants to life imprisonment if the trial continued and they were found guilty. Whereas the judge's comments in *Tateo* were found to have coerced a plea of guilty, the judge's comments in the instant case were within the bounds of the discretion vested in him over the control of a trial.

After the colloquy was concluded, the district judge, at the request of Kent's counsel, called a recess to enable Kent and his counsel to confer. According to the post-trial petition filed by Kent and the affidavit of his trial counsel submitted in support thereof, the actions and statements of deputy United States Marshal Eugene Bissell, occurring during the recess, further induced him to change his plea to guilty. In his petition, Kent alleged that Bissell entered the room where he was conferring with his counsel and engaged in a whispered conversation with him. During the conversation, Bissell allegedly stated that he had talked to the judge about Kent's case, that Kent, Bissell and the judge were all Nobles in Medinah Temple, and that the judge would give Kent a "break" if he pleaded guilty. In addition, Kent alleged that Bissell instructed him to answer in the negative if he were "asked if anybody promised you anything." Bissell then showed Kent his Medinah Temple membership card.

After Bissell left the room and Kent and his counsel concluded their conference, they returned to the courtroom and Kent requested leave to withdraw his plea of not guilty and to plead guilty to the first five counts of the information. Before accepting his plea, the judge, among other things, inquired of Kent whether any representations had been made to him with respect to punishment if allowed to change his plea. Kent responded in the negative.

Both Kent and his trial counsel testified at length concerning this alleged incident with Bissell. Bissell was not called to testify by either Kent or the Government. The Government, however, did submit a sworn affidavit in which Bissell denied making any of the statements attributed to him by Kent.[4]

On the cross examination of Kent and his trial counsel during the hearing, the assistant United States Attorney elicited several substantial discrepancies between the acts and statements attributed to Bissell in Kent's petition and his counsel's supporting affidavit and their testimony at the hearing concerning these incidents. There were also discrepancies between the facts as testified to by Kent's trial counsel and the facts as testified to by Kent. The only corroboration afforded Kent's allegations by his trial counsel's testimony was that Bissell entered the room and showed Kent his membership card — actions not denied by Bissell in his affidavit. In response to questioning by the judge, Kent admitted at the hearing that he had lied on at least one occasion during the trial. These inconsistencies, falsehoods, and memory lapses assume added significance in view of the very short period of time that elapsed between the alleged occurrence of the Bissell incident and the hearing.

Because of the largely uncorroborated nature of Kent's allegations concerning Bissell, the fact that Kent had lied to the court under oath, and the fact that his petition and his trial counsel's affidavit contained errors and inconsistencies, we believe that the district judge properly chose to disbelieve their accusations against Bissell. In so doing, he did not abuse his discretion as the sole judge

[4] Bissell did admit that he showed Kent his Medinah membership card.

of the creditability of witnesses. *United States* v. *Washington*, 341 F.2d 277 (3d Cir.), *cert. denied, sub nom., De Gregory* v. *United States*, 382 U.S. 850 (1965).

Kent's second contention is that the district judge, in allowing him to withdraw his plea of not guilty, failed to comply with FED. R. CRIM. P. 11.[5] Specifically, Kent contends that the district judge did not ascertain whether he understood either the nature of the charge against him or the allowable range of punishment.

When Kent returned from the conference with his counsel and indicated that he desired to withdraw his plea of not guilty and to plead guilty, the judge said, "Before I permit you to do that, I must tell you some things and ask you some questions." The judge proceeded to read the five counts of the information to which Kent desired to plead guilty. He then inquired, "[D]o you understand fully the nature of the charges . . . ?" Kent replied in the affirmative. With respect to the consequences of Kent's change of plea, the judge said, "I must tell you, . . . that the court could impose a maximum penalty of one year in prison on each of these counts — maximum means the most that I could do — and a fine of $1,000 maximum

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[5] Rule 11 was recently amended to read:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

on each of these counts, or both." Next, the judge asked whether any representations had been made to Kent concerning punishment if allowed to change his plea; Kent replied in the negative. Finally, the judge inquired of Kent whether he was a narcotics user; Kent replied in the negative.

After the judge allowed Kent to withdraw his plea of not guilty and to plead guilty, Kent's counsel moved for a pre-sentence investigation and the United States Attorney moved for a hearing in aggravation. The former motion was denied, and the latter motion was granted. At the conclusion of the testimony in aggravation, Kent's counsel presented matter in mitigation. The judge then granted Kent leave to speak in his own behalf. While Kent was speaking, the judge addressed Kent, saying that he had reviewed with Kent what he was charged with and that Kent had said he understood the charges. Kent replied, "It still stands." Consecutive nine-month terms of imprisonment as well as cumulative fines of $500 were imposed on each of the five counts.

We conclude that there is no merit in Kent's contention that the district judge failed to comply with Rule 11. First, the district judge addressed Kent personally to ascertain whether he understood the nature of the charges against him. The judge had no reason to believe that Kent did not understand in view of his statement that he did and Agent Braseth's trial testimony that Kent had considerable familiarity with the new federal drug laws and their requirements. At the post-trial hearing, Kent's trial counsel testified that he had told Kent of the possible punishment he might receive and that he had read the statute and the information to him. See *United States* v. *Lowe,* 367 F.2d 44 (7th Cir. 1966); *United States* v. *Rizzo,* 362 F.2d 97 (7th Cir. 1966).

Second, the judge on at least two occasions informed Kent that he could receive a maximum penalty of one year and a $1,000 fine on *each count.* Kent was likewise informed of the possible penalty by his trial counsel. Since Kent was obviously aware that he was pleading guilty to five counts, he could not have misunderstood that the maximum penalty he might receive was five years and $5,000. Kent's statement through his counsel after sentence was imposed that he didn't understand the sentence reflected his disappointment with the sentence he received rather than a failure to understand the possible sentence he could receive. A frustration of hopes after the fact is not equivalent to a failure to understand before the fact. *Cf. Trujillo* v. *United States,* 377 F.2d 266 (5th Cir.), *cert. denied,* 389 U.S. 899 (1967); *Katz* v. *United States,* 353 F.2d 312 (8th Cir. 1965).[6]

Since the district judge complied with Rule 11, and further since there was an insufficient showing that Kent was coerced or intimidated into pleading guilty, let alone a showing of "manifest injustice" required under Rule 32(d), the district judge properly denied Kent's motion.

The judgment of the district court is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[6] Since Kent's motion to withdraw his plea of not guilty was made after a substantial portion of the Government's case in chief had been presented, the judge could properly satisfy himself that there was "a factual basis for the plea" as required by FED. R. CRIM. P. 11. *Maxwell* v. *United States,* 368 F.2d 735, 739 n. 3 (9th Cir. 1967).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Tuesday, June 18, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 16356 vs. FRANK P. KENT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court entered therein on July 6, 1967, in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Monday, August 26, 1968

Before

Hon. LATHAM CASTLE, *Chief Judge*

Hon. JOHN S. HASTINGS, *Circuit Judge*

Hon. LUTHER M. SWYGERT, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 16356 vs. FRANK P. KENT, Defendant-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

APPENDIX D

STATUTES

Title 28, § 2255, United States Code Annotated, p. 563.

Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence * * * is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

RULES

Title 18, Rule 11, United States Code Annotated, p. 298, provides in pertinent part:

> "* * The Court * * shall not accept the plea without first determining that the plea is made voluntarily with understanding the nature of the charge."

Title 18, Rule 32. Sentence and Judgment. U.S.C.A. pp. 7-8:

> (a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.
>
> • • •
>
> (d) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.